IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

LETTERS PATENT APPEAL NO. 12 OF 1991
IN
FIRST APPEAL NO. 3 OF 1991.

1. Mrs. Kumudini Keshavrao Yawalkar,
   Indian Citizen, Aged about 56 years,'
   Residing at 52, Bajaj Nagpur,
   Nagpur-10.

2. Mrs. Malti Shantaram Bansode,
   Idnian Citizen, aged about 53 years,
   Residing at Bombay Sapper's Housing
   Coloney, Behind Kamkaria Petrol Pump,
   Pune-14.

3. Mrs. Sumati Vijarao Kubde,
   Indian Citizen aged about
   44 years, Residing at 256,
   Shankarnagar, Nagpur-10.

4. Mrs. (Dr.) Meenakshi Shivajirao Bapat,
   Indian Ci.tizen, Aged about 38 years,
   Residing at D/91, Tapti Road,
   Central Railway Colony, Bhusawal. .. Appellants.

Vs.

1. Shri Punamchand Premchand Lohade,
   Indian Citizen, aged about 58 years,
   Occ. Chartered Accountant, .. Respondent
   Residing at 1505/5/8, Ganga-Jamuna No.1 (orig.-
   Pune-4. Applicant)

2. Shri Ramesh Babsurao Bhavirkar,
   Indian Citizen, aged about 50 years,
   Occ.-service, Residing at 52, Panmala,. (Respondent
   Vithalwadi Road, Pune - 30. No.2- Orig.
   Opponent No.2)

3. Mrs. Prabhavati Narayanrao Bhalinge,
   55 years, Indian Citizen,
   Residing at 1205, 4 Shivaji Nagar,
   Pune - 4. ...Respondent
   (No.3 Orig.
   Opponent No.4)

Shri Harshad E. Palwe for Appellants No.1,2 and 4.

Shri S.M. Gorwadkar for Respondent NO.1.
Shri K.Y. mandlik for Respondent No.2.
Respondent NO.3 served.

CORAM : F.I. REBELLO &
ANOOP V.MOHTA, JJ.

DATE : 18TH AUGUST, 2004.

ORAL JUDGMENT (PER ANOOP V. MOHTA, J.)

1. This Letters Patent Appeal has been preferred by appellants (Original Objectors), thereby, challenging the judgment dated 14th January, 1991, passed by learned Single Judge in First Appeal No. 3/1991, whereby the grant of the probate, in Special Civil Suit No.382 of 1989 by Judgment dated 26th November, 1990, was confirmed. Therefore, Appealed against the concurrent findings and Judgments.

2. The basic law of the Will, its execution and proof, has been reiterated by the Division Bench of this Court [Per Anoop V. Mohta, J.] in Appeal No.818 of 2001 decided on 12th February, 2004 (Sanjay Purshottam Vaidya V. Smt. Vidula Purshottam Vaidya and others), as relevant, is reproduced as under;

> "The will and wishes of the testator has to be respected. The intention of the testator has to be gathered from the Will. The intention has to

be extracted and crystalised from the language of the Will which has to be read as a whole. The mental condition, health, surrounding circumstances, position of the testator and family relationship of the testator are the cardinal pillars for constructing a Will. If, a Will and its contents are clear, isolated expression looses its strength. The respective interpretation of the contesting parties cannot be accepted when the language and the words of a will is clear and unambiguous. The construction of a Will would always to advance the intention of the testator. Therefore, in a case of any ambiguity or uncertainty, construction of a Will has to be gathered, extracted or collected from the surrounding circumstances."

" **Basic Judicial opinions on the validity of a Will, its execution and proof:**- Leading cases which are, reflected and referred, from time to time, in such matters, are quoted in the following paras

A.I.R. 1977 S.C. 74 (Smt. Jaswant Kaur Vs. Amrit Kaur and others.

"There is a long line of decisions bearing on the nature and standard of evidence required to prove a will. Those decisions have been reviewed in an elaborate judgment of this Court in R. Venkatachala Iyengar Vs. B.N. Thimmarjamma (1959) Supp. (1) SCR 426 = (AIR 1959 SC 443) The Court, speaking through Gajendragadkar J., laid down in that case the following propositions:-

1. Stated generally, a will has to be proved like any other document, the test to be applied being the usual test of the satisfaction of the prudent mind in as much matters. As in the case of proof of other documents, so in the case of proof of wills, one cannot insist on proof with mathematical certainty.

2. Since Section 63 of the Succession Act requires a will to be attested, it cannot be used as evidence until, as required by Section

68 of the Evidence Act, one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence.

3. Unlike other documents, the will speaks from the death of the testator and therefore, the maker of the will is never available for deposing as to the circumstances in which the will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last will and testament of the testator. Normally, the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the will.

4. Cases in which the execution of the will is surrounded by suspicious circumstances, stand on a different footing. A shaky signature, a feeble mind an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the will. That suspicion cannot be removed by the mere assertion of the propounder that the will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the will excite the suspicion of the Court, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.

5. It is in connection with wills, the execution of which is surrounded by suspicious

> that the test of satisfaction of the judicial conscience has been evolved. That test emphasises that in determining the question as to whether an instrument produced before the Court is the last will of the testator, the Court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the will has been validly executed by the testator.
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> 6. If a caveator alleges fraud, undue influence, coercion etc. in regard to the execution of the will, such pleas have to be proved by him but even in the absence of such pleas, the very circumstances surrounding the execution of the will may raise a doubt as to whether the testator was acting of his own free will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter."
>
> It is also settled that;
>
> "A Will is executed to alter the mode of succession and by the very nature of things it is bound to result in either reduction or depriving the share of natural hair."

. Thus, facts and circumstances of each case lead to a particular conclusion."

3. One Baburao Premji Bharvirkar (Testator) executed a Will dated 12/9/1986 wherein, Respondent No.1, original applicant, was appointed as an executor. The said Will is registered at Pune on 12/9/1996, by the Testator himself. The Testator died on 15/5/1987 at Pune. The said Will is duly attested by the witnesses one Shri S.B. Gujrathi and the executor himself.The details of the property immovable or movable, are

annexed in the schedule A to D, attached to the said Will.

4. Respondent NO.1 therefore, moved an Civil Misc. Application No. 106/1988 dated 28/2/1988 for a grant of Probate on the basis of the Will in question. As per considering the due procedure of law, notices were issued to the relatives of the testator, including appellants 1 to 4. Appellant No.1 [Kumudini PW1] (D.W. 1 for Defendant No.6), appellant No.2, (D.W.1 for Defendant No.5), Appellant No.4 and respondent No.3 are the daughters of the deceased testator. They are sisters of respondent No.2. By their Written Statement dated 4th July, 1989, the original opponent No.1 i.e. Mrs. Kahmabai Bharvirkar (now dead) the wife of late Shri (deceased) Baburao Bharvirkar, testator. The respondent No.2 original opponent No.2 is the son of Smt. Kahamabai original opponent No.1. All the daughters of the testator resisted will and grant of probate, on the grounds that deceased testator was very old man of 80 years and was not in a sound state of mind. The Will is not free Will. All 5 daughters have a share in inherited agricultural lands The daughters have share in the ancestral property and the, deceased

testator father had no right to Will it to any one.The relations of mother and son were strained after the death of the testator, and said Kahamabai had to leave her son and his house. The respondent No.1, original appellant, played fraud, undue influence and threat upon the executor with the help of opponent No.2 i.e one Shri S.S. Gujrathi, a witness to the said Will. This is not the last Will of the testator. The respondent No.1 Punamchand is Chartered Accountant, who is nominated as executor and he is likely to grab the assets and property of the testator.

5. The parties have led the evidence of one Kumudini (P.W.1), Smt. Sumati (D.W.1 for defendant No.6), Malti (D.W.1 for defendant No. 5), Meenakashi (for applicant No.4), Shantaram(D.W for defendants), Punamchand (D.W.1/Respondent NO.1) (Executor), Mangalal Sonavane (Sub-Registrar), Suresh (Witness (P.W.3), Vilas (P.W.4), Advocate, Supriya Dilip Sarvate, Advocate. The learned Judge after considering the material, as well as, evidence led by the parties passed the judgment dated 26th November, 1990 and held that the plaintiff respondent No.1, proved the validly registered Will of late Shri Baburao Bhavirkar, (deceased), testator, who

had executed the same with full knowledge and in good physical and mental condition at the relevant time. The said Will is the last testament of the testator Baburao. The objectors (opponents) failed to prove that the testator was influenced and pressurised by his son Ramesh and witnesses, who signed the alleged Will on 12/9/1986. The Objectors/appellants further failed to prove that it was not proper and legal to Will inherited landed property by the testator and as it deprives the natural heirs, daughters and their legitimate legal rights over the land. The learned Judge did not answer the issue regarding the rights and monetary help which should be granted to the widow of the testator. Accordingly, the respondent No.1's suit was decreed and further directed to issue the probate of a Will in the name the executor Punamchand Premchand Lohade, in respect of the properties mentioned in the Will Exh.35 in the schedule attached to the plaint Exh.1, on payment of requisite Court fee and stamp on the same.

6. Appellant/opponents therefore, preferred the First Appeal No.3/1991 and the learned Single Judge, after hearing the parties dismissed the said appeal by observing as under so far as first appeal is concerned;

> "As per the submission at the Bar, the widow of the Testator who subsequently died on 15.5.1987 is the first beneficiary and after her death, son of the Testator has been nominated i.n her place to derive the income of the property."

The learned Single Judge also observed that the testator himself presented the Will for registration. The argument that signature on the three different wills does not bear the date is totally misconceived. The attesting witnesses have testified and proved the Will. Therefore, even as per the learned Single Judge there was no merit in the matter and accordingly, it was dismissed, the contention of the appellant that the Will is not genuine, was also rejected.

7. One cannot overlook the fact that this Letters Patent Appeal (LPA) is against the Judgment passed by the Single Judge of this Court. This is an intra- Court Appeal. The jurisdiction and limitation of the Court on L.P.A., are well known, as the judgment passed by the Single Judge of the High Court is required to be considered by the Division Bench of the High Court. Therefore, if there is any perversity or any reasoning, contrary to the record and/or law, and which are

apparent on the face of the record, then only in such L.P.A., the Division Bench may interfere with the finding given by the Single Judge, otherwise there is no question of interfering with the reasoned order passed by the Single Judge, even if there is some other view, in a given case, may be possible. The possible view based on the evidence, and material including the law, cannot be interfered in L.P.A. In the present case admittedly, the single Judge after considering the material, as well as, contentions as raised by the appellant's Counsel, confirmed the finding given by the Courts below, of granting the probate in favour of the testator. In this background we are proceeding with the matter.

8. The first and foremost consideration is whether the will is genuine and executed by the testator/deceased, when he was sound mind, health and normal physical and mental condition. The attesting witnesses Punamchand (P.W.1) (plaintiff) deposed that "at the time of execution of a Will his mental and physical condition was quite well" "then advocate Dhumal and Barvikar went from my office and office of Sub-Registrar, accordingly the Will was registered".

The original Will is lying in the office of Sub-Registrar". " The testator signed first in presence of himself and Advocate Gujrathi, then signed the document and accordingly I made my signature in presence of testator and Gujrathi as witness, thereafter Gujrathi signed the documents in presence of both. Before signing the document I enquired with Barwirkar whether contents of documents were read and followed by him or otherwise." The appellants/objectors could not shatter the above evidence. On the contrary he further deposed in cross-examination that, "the signature appearing on the first page of the document is also of Mr. Barvikar. For presentation of the document, Advocate Gujrathi also made signature on this document in my presence and in presence of Testator Mr. Barvikar. I now shown page 5 of the document, Advocate Gujrathi had made signature in my presence and Mr. Barvikar, then I made my signature in presence of both. This is the same Will Exh.35. The contents are now read. It bears my signature and Lohade and Barvikar, "the date and month mentioned on first page of the Will, below the head in handwriting. In my presence Barvikar has made his signature on first page, and pages 2,4, and 5. Below his signature he put date 12/9/19986 is mentioned". " During that period Barvikar

visited my office till making signature below the document the physical condition of Barvikar was quit sound, even his mental condition was sound, as he has given clear instructions of his documents to him." His evidence also could not be shattered by the objectors/appellants. "It is not true to say that Advocate Lohade, Barvikar and his wife have tried/inspired and prepared false will". "It is not true to say that Baburao Barvikar has not signed on these documents." One more witness P.W.4 Vilas deposed that "I was present during the course of this talk between Barwikar and sub-Registrar. Identification of Barwikar is given by me. My signature on this page is there of page 3 of the document. I identify the same. Physical as well as mental condition of Mr. Barwikar during the course of transaction at the office of Lohade and at the office of Sub-Registrar was quit sound". This evidence was also remained intact. The learned trial judge also therefore, after considering the material, as well as. evidnece led by the parites rightly held that the objector/appellant failed to prove that the testator was influenced and pressurised by his son Ramesh and witnsses to sign the alleged will on 12/9/1996. It was rightly observed that the said will

was executed by Baburao Barvikar with full knowledge and his physical as well as, mental condition was sound even though he was aged 80 at the relevant time. The fact which remained untouch is that the said testator after execution of the said Will dated 12/9/1986, himself submitted the said document for registration. All the legal formalities have been complied with and as recorded above, in presence of the witnesses, which according to us are sufficient to justify the proper execution of the Will and its registration.

9. The deceased testator's own will and its registration, before the death i.e. on 13.5.1987, further disproved the case of the appellantS that Will was executed under un due influence or by playing fraud, as alleged. There is no contrary evidnece or material to uproot the above case of respondent No.1/ original plaintiff. All the necessary elements of the valid execution of the Will and its registration, as referred above, and as declared by the Supreme Court or other High Courts, have been complied with. There is no case made out, as observed by the Courts below to justify interference with this valid execution of Will and its registration. According to us also, respondent NO.1 has

duly proved the Will, by examining the attesting witnesses. There is nothing placed on the record by the appellants to prove that the Will was ungennuine. No material evidence was placed on the record to prove their allegation of fraud or undue influence. The appellants failed to prove any suspicious circumstances surrounding the execution and or of the Will. The Testator's capacity, his mental condition and apart from the registration of the said document by the testator himself, are sufficient to disbelive the case of the appellants. On the contrary it proved the case of respondent No.1 about genuineness and the validity of the Will. The above witnesses including executor, attesting witness, advocate Lohade, Gujrathi and Dhumal also support the case of the respondents.

10. The appellants failed to prove their case even though serious allegations were made against Advocate Shri Gujrathi and Lohade as well as, executor Ramesh Barvikar. Such allegations need detail and basic material to support the case of fraud and undue influence. Mere allegations are not sufficient. The appellants failed to prove that they have joined hand and prepared false Will of the testator. Non production

of the certificate of the Doctor, to know the exact condition of the testator at the relevant time, cannot be the reason to discard the other material evidnece placed on the record and that by itself cannot be the reason to cast doubt about the genuineness of the Will. The appellants failed to prove the assertions of the fact about fraud, coercion, and undue influence or collusion.

11. The respondent NO.1 is Charter Accountant practicing since 30 years, the executor, a known person to the testator, but that itself cannot be the reason to discard such genuine Will. Other witnesses are Advocate Gujrathi and Lohade. Their evidence cannot be overlooked specially when the appellants failed to shatter and or place on the record any contradictory or contrary material in support of their objection. Once the basic elements of valid Will are satisfied and its execution duly proved, as per law, mere allegations that Ramesh joined hand with the Lohade in preparation of the Will in question, cannot be sufficient to disprove the validity of the Will. The evidence of all the witnesses in support of Will are fully corroborated by each others evidence and deposition. There are no contradictions

pointed out or argued or recorded and or brought out in cross-examnined by the objectors disproving the genuineness of the Will and or its registration. According to us also objectors/appellants failed to prove their own case and or disproved the case of respondent NO.1. This is also supported by the evidnece of Advocate Supriya, specially when her evidence was not at all challenged by the objectioners/appellants.

12. The learned Counsel appearing for the appellants contended in this appeal that there are three Wills placed on the record which vary from each other. Once the validity of the will is proved, some mino discrepancies in the copies of the will, basically on the ground of want of signature or dates on Will on first page or others are not sufficient to doubt the genuineness of the Will. According to us once the basic document is proved validly, merely absence of date and the month on the first page of the Will Exh.35, that by itself cannot be the reason to discard the remaining part of the Will. The proved signature of the testator and witnesses supporting the execution of the said Will itself and its contents, are sufficient to maintain the impugned judgment and order.

13. The deceased testator's voluntary act of submitting the said document for registration and the said registered will, cannot be tested at the instance of the appellants, merely because Officer of the Sub-Registrar office of the Will, was unable to identify the signature of the testator, that itself cannot be the reason to disbelieve the attesting witnesses of the said Will itself. Merely because no date is mentioned against the signature of the testator by that itself cannot be the reason to overlook the whole Will and its contents, specially when other material, as well as, deposition of witnesses, justify the execution of the said will including its registration. According to us there is no material placed on the record by the appellants and or could be pointed out to interfere with the finding given by the Court below which was confirmed by the learned Single Judge.

14. There is no dispute that the will in question is made by deceased Baburao and the respondent No. one is appointed as executor of the same. The real beneficiary are son of deceased Baburao as well as his wife. The propounder by leading appropriate evidence of attesting

witnesses and other relevant witnesses proved the existence of valid Will, its contents and its genuinness. There were vague pleading and evasive denial by the objectors in so far as their positive allegations of fraud, undue influence. Merely because the relations between the deceased son were not cordial as alleged, that itself, in absence of specific and or related, evidence, cannot be the reason to discard the rights created in the Will. The objectors basically led evidence to show the conduct of Ramesh son of deceased and as alleged strained relations with the deceased father and mother and also strained relations with other sisters. The only challenge by Kumudini P.W. 1 was that the day and date mentioned on the first page of the Will was not there on the copy of the will sent to them. It might be on the second page. She challenged further the portion of the will whereby, it is mentioned that the marriage of all the daughters are performed at his costs and are happy with their in-laws, only because during the relevant period husband of her younger sister was no more and she was widow. She made bald allegations against Gujrathi, Advocate, Lohade, Ramesh about preparing false Will in question. She could not place on the record any document showing other signature

of deceased Baburao. She admitted that his father was entitled to Will the entire properties.

15. The objectors Sumati D.W. 1 for defendant No.6 supported the case of strained relations. However, No other material was produced to substantiate the case of fraud or undue influence except bald allegations, even by this witness She also admits that some income is given to her mother and in addition to it she gets pension. This further shows that in the will there is a certain provision made for Kshmabai, wife of the Baburao. Now as record shows and as observed, the wife of the testator Kshmabai is no more. Therefore, that issue has not been raised and argued by the parties, in the appeal.

16. Not granting any property to his wife (now dead) in the Will is one of the alleged critical issue. Testators wife was also not aware of the said will. However, one cannot over look a Judgment reported, of our Court is A.I.R. 1976 Bombay 351 (Totaram Maharu V. Ramabai and others). The trial Court has taken note of the same and reproduced para 5 as under.

> If Will not known to the wife, it does not possible to draw any sinister inference from this fact alone."

17. The appellant's, married daughters could not have claimed any right over the ancestral property, of the testator. No one can challenge the testator's right to dispose of and or bequeath his own property and or undivided shares.

18. One Malti Shantaram Bansode, D.W. 1 for defendant NO.5, again raised a case about strained relations, between testator Baburao and Ramesh i.e. brother of Malti. She deposed that she had never seen handwriting of her own father in Marathi. He used to write in English. She admit that it is mentioned in the will that all the daughters are financially in good condition. The financial position of my husband is good. He was not dependent on anybody. She also deposed that it is not irregular to make will in onces-own language. She also deposed that her father was not suffering from any diseases and he was looking after all his transactions till his last period.

19. Meenakshi another daughter of the Baburao

testator was examined, Except for the statement of strained relations of Ramesh and his father, no other material was placed on the record to support their case of fraud or undue influence. She was unable to identify the signature of her father. She raised doubt about the signature of her father. She felt that her father never told them about the execution of the Will. She was also unable to place on record or show any other signature of the testator. She is well placed and is working as doctor in hospital since 1977. She has received share from the ancestral property from her husband. She also admits that her mother expired at Nagpur.

20. Other witnesses supported the case of the original applicants. The propounder has discharged its burden in support of the valid Will.

21. The registration of the Will by itself may not be the reason to overlook the suspicious circumstances, if any. The officer from the Sub-Registrar office, nowhere disproved the case of the respondents about the valid registration. No other suggestions were put to this officer. As pointed out earlier, the testator, himself submitted the document and at the relevant time,

he was in good/ sound mental and physical condition. There remain no doubt that said registered will has to be respected.

22. The will in question has basically, taken care of the beneficiary, the only son Ramesh and his wife. However, in the facts of the case some of the relatives of the deceased were not provided anything in the said will. As already observed above, and as settled by the various Courts, that the execution of such Will always alter the mode of the succession and that results into either reduction or depriving the share of the natural heirs. The Apex Court in A.I.R. 1971 S.C. 2236 (Sushila Devi V. Pandit Krishna Kumar Missior) has observed and declared that even if properties are not bequeathed to the relatives that itself cannot be be the reason to disbelieve or discard the validly executed Will or intention of the testator as reflected in the Will. In the present case, even if no property has been given by the testator to his daughters that itself cannot be the reason to discard the registered will. It is observed in the Will itself that the daughters are well placed. This suggest that the testator was fully

aware of his daughters' happy family life and their conditions in all respect.

23. Appellant's Counsel makes statement that Respondent No. one Executor is dead. As death of the executor will not affect the merit of the matter. We are dismissing the appeal and as contesting respondent No.2 is on the record. We are not passing any order on this issue.

24. Considering the above we see no reason to interfere with the judgment and order passed by the learned Single Judge, confirming the judgment and order passed by the trial Court of granting probate.

25. In view of this the present Letters Patent Appeal is dismissed. No order as to costs.

. Parties concerned to act on a simple copy of

this order, duly authenticated by the Court Stenographer/Company Registrar of this Court.

[F.I. REBELLO, J.]

[ANOOP V. MOHTA, J.]